

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In re Applications of)	MM Docket No. 93-89
AURIO A. MATOS)	File No. BPH-911114MS
LLOYD SANTIAGO-SANTOS and LOURDES)	File No. BPH-911115MP
RODRIGUES-BONET)	
For Construction Permit for a New)	
FM Station on Channel 293A in)	
Culebra, Puerto Rico)	

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MAY 29 1994

To: The Review Board

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY COMMENTS

Aurio A. Matos ("Matos") and Lloyd Santiago Santos and Lourdes Rodrigues Bonet ("Santiago and Rodrigues") (collectively the "Applicants"), by their counsel and pursuant to Section 1.294(c) of the Commission's Rules, submit their reply to the Comments on Joint Request for Approval of Settlement Agreement filed by the Mass Media Bureau (the "Bureau") on April 18, 1994.

The Bureau argues that the settlement agreement as proposed by the Applicants cannot be granted for two reasons: (1) the prevailing applicant, Matos, has no viable transmitter site and (2) the consulting agreement between the Applicants as of this date exists only in a draft form and therefore must be deemed a "sham."

The Site Issue

The Bureau's arguments with respect to Matos' site are baseless. The site Matos proposed in his February 7, 1994 amendment has not, as the Bureau asserts, been "rejected by the FAA

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as a hazard to air navigation." Bureau Comments ("Comments") at ¶ 6. ¹ Matos reported in his April 14, 1994 amendment that a further FAA study of the proposed site at a reduced tower height would be necessary before a determination of no hazard could issue. Matos did not, as the Bureau suggests, report that the FAA "rejected" his site.

The site proposed by Matos in his February 7, 1994 amendment is still the site Matos is prosecuting. The FAA Acknowledgement determined that the tower at the height Matos proposed had an adverse impact on instrument altitudes at the Culebra airport, Matos is prosecuting the tower site proposed in that amendment. As reported to the Commission in an amendment filed by Matos on May 5, 1994, the FAA issued a Determination of No Hazard for the proposed Matos site with a 99 foot tower on May 4, 1994. Matos absolutely intends to rely on the site specified in his February 7, 1994 amendment, with a minor change in tower height. An engineering showing reflecting the reduced tower height will be filed as an amendment within ten days. ²

The Bureau's argument that Matos "does not have a viable transmitter site" ignores the facts. Matos continues to diligently prosecute his application at the same transmitter site proposed in

¹ The FAA document the Bureau relies on is an "Acknowledgment of Notice of Proposed Construction" that was issued on March 16, 1994 (the "FAA Acknowledgement").

² At or shortly after the time the amendment to specify a 99 foot tower at Matos' proposed site is filed, the applicants will amend the Settlement Agreement, making it contingent upon grant of the amendment proposing a 99 foot tower height at the February 7, 1994 site.

his February 7, 1994 amendment. The Bureau was aware on April 14, 1994, that the FAA was circulating Matos' request for a 99 foot tower at his February 1994 site for comment (much like an FCC rulemaking proceeding). Upon completion of the comment period, the FAA, assuming no opposition, would issue a no hazard determination, as it now has. Matos' site as specified in his February 7, 1994 Amendment was and is a "viable transmitter site." ³

The Consulting and Escrow Agreements

On March 21, 1994, the Bureau filed a letter with the Review Board indicating that it would withhold comment on the Applicant's Settlement Agreement until after it received "supplemental additional materials" in support of the settlement agreement. The Bureau requested the documents by telephone from one of the parties. ⁴ The Bureau requested in one of its post-March 21, 1994 informal telephonic conversations with one of the Applicants, a copy of the Consulting Agreements between the Applicants and the Escrow Agreement covering the salaries that were to be paid under

³ The Bureau seems to imply that upon issuance of the FAA's Acknowledgement, Matos was obliged to petition for leave "to amend his application to specify a new technical proposal." The Bureau's position is not logical. Matos proposed a reduction in tower height to comply with the FAA's finding, then commissioned further FAA study. Absent the outcome of that study, no amendment to Matos' technical proposal is required so long as he is acting diligently.

⁴ Neither from its March 21, 1994 letter to the Review Board or any subsequent written communications to the Applicants has it been made clear exactly what documents the Bureau considered necessary for it to comment on the settlement agreement.

the Escrow Agreement. (collectively, the "Agreements")⁵ The Applicants, in an effort to fully comply with the Bureau's request, provided the Bureau with copies of the Agreements on April 22, 1994. (See April 22, 1994 Letter from the Applicants to Gary Schonman, attached as Exhibit A (the "April 22 Letter")).

The April 22 Letter makes clear that the Bureau was provided with draft copies of the Agreements. The Applicants had only recently agreed to the language of these Agreements and, knowing the Bureau had asked to review these documents, elected not to execute the documents until the documents were in a form agreeable with the Bureau, so that the Bureau could offer favorable comments on that aspect of the Settlement Agreement. This intent is evidenced by the plain language of the April 22 Letter:

The applicants and their counsel have reviewed and revised [the Consulting and Escrow Agreements] thoroughly in an attempt to assure compliance with FCC rules, policies, regulations and guidelines. It is our hope that we have succeeded in our mission, however, if you have any problems or concerns with respect to these documents, we would appreciate your input, as we would prefer getting these documents into acceptable form before having them executed by our respective clients. (emphasis added).

In its comments, the Bureau offers no reaction to the representations and terms of the Agreements. The Applicants have come to an agreement that would pay Santiago and Rodrigues a reasonable hourly salary for their expertise and both sides have achieved a level of security through the use of an Escrow Agent to insure that money is available for payment and is paid out from the

⁵ The basic terms of the Consulting and Escrow Agreements are set forth in the Settlement Agreements.

escrow fund only if work is performed. The terms that the Applicants agreed to are set forth in the draft that was provided to the Bureau. The Applicants planned to incorporate any changes or suggestions the Bureau offered which would improve the likelihood of approval by the Review Board.

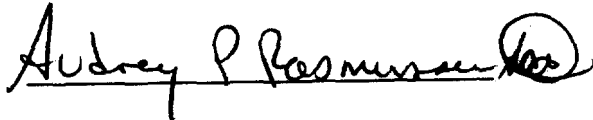
The Bureau is a party to the case, representing the public interest. Oftentimes in these hearings, the public interest is best served through settlement. ⁶ The Applicants tried to get the Agreements into FCC acceptable form before execution and filing with the Commission. The draft was provided to the Bureau in an effort to expedite the resolution of this proceeding. The Applicants' goal was to avoid a potential conflict, and a series of responsive pleadings and/or revisions to the Agreements by obtaining the Bureau's approval of the form and substance of these Agreements first.

The Applicants are fully prepared to execute the Agreements. They would prefer (and the public interest would best be served) if the Agreements were first in a form the Bureau approves. If the Bureau elects not to comment on the substance of the Agreements, and the Review Board decides that these Agreements must be filed in order for the Board to rule on the Settlement Agreement, then

⁶ The Commission constantly exhorts parties in comparative hearings to settle their cases, as settlements of these proceedings, within FCC guidelines, serve the public interest better than endless litigation.

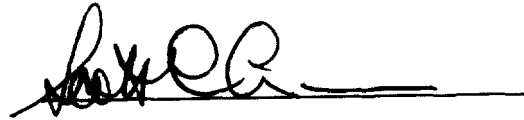
the Applicants will execute and file the Agreements without the prior approval of the Bureau.

Respectfully submitted,



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May 9, 1994

CERTIFICATE OF SERVICE

I, Phyllis Lee, do certify that on this 9th day of May, 1994, a copy of the foregoing was sent via first class mail, postage prepaid or delivered, as indicated, to the parties set forth below:

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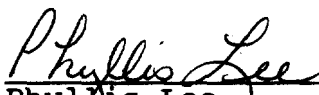
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